Supreme Court, U.S.
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No. 97-1272

In The

Supreme Court of the United States

October Term, 1997

WILLIAM A. GOICHMAN,
aka WILLIAM A. KENT,

Petitioner,

vs.

W.C. KELLY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does Rule 58 of the Federal Rules of Civil Procedure require an order on a post-judgment motion to be in a document separate from the court's analysis of the motion, a discussion of the basis for its decision and the court's decision on the motion?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondent City of Carmel-by-the-Sea, a municipal corporation, and the Carmel Police Department ("Respondent" or "Carmel"), respectfully requests that this Court deny the petition for certiorari, seeking review of the opinion of the Court of Appeal for the Ninth Circuit, in this case.

STATEMENT OF THE CASE

Petitioner seeks review of the decision of the Ninth Circuit Court of Appeal which rejected his appeal of the District Court's August 22, 1996 order denying Petitioner's motion for an order to show cause. The Court of Appeal determined it lacked jurisdiction to review the August 22 order on the basis that the appeal was not timely filed, and that Petitioner's District Court motion for reconsideration did not toll the 30 day appeal period because it too was not timely filed.

The gist of this appeal is whether or not the August 22 order was correctly made and entered for purposes of Rule 58 of the Federal Rules of Civil Procedure. Since Petitioner now understands he failed to timely appeal the August 22 order and, because his untimely appeal before the Ninth Circuit was denied on procedural grounds, Petitioner now asserts that the August 22 order was defective for purposes of Rule 58 and accordingly, either the time period for filing an appeal has not yet begun to run or, alternatively, the Ninth Circuit should have applied the "spin-around rule" and accepted his appeal.

This petition raises a question of law whether or not the District Court's August 22, 1996 order was properly made for purposes of Rule 58. If the order was properly made and entered for Rule 58 purposes, or if Rule 58 is not directly applicable to decisions on post-judgment motions, the Ninth Circuit correctly rejected the appeal as untimely and this Court should deny the petition.

Respondents submit the Court of Appeal properly concluded it lacked appellate jurisdiction and refused to consider the appeal. The record reflects that the District Court's August 22 order was properly made for Rule 58 purposes.

REASONS WHY THE PETITION SHOULD BE DENIED

I

THE DISTRICT COURT'S AUGUST 22, 1996 ORDER SATISFIED RULE 58

Petitioner argues that the District Court's August 22, 1996 order denying his application for an order to show cause was not a final, appealable order since it violated the technical requirements of Rule 58 of the Federal Rules of Civil Procedure. Rule 58 requires that " . . . every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered [in the docket] as provided in Rule 79(a)."

The meaning and application of Rule 58 has been extensively litigated since the separate document requirement was created in 1963. The August 22, 1996 order denied a motion filed by Petitioner in a civil case in

which the final judgment was entered on May 14, 1979. The motion brought was for an order to show cause why the City of Carmel-by-the-Sea and the Carmel Police Department should not be held in contempt for allegedly violating the terms of the 1979 final judgment. Respondent opposed the motion on jurisdictional grounds. The District Court denied the motion and the August 22 order so states in plain, clear language. The order was entered on August 22, 1996 by the Clerk in the docket as an order denying the motion and was properly served on all parties. The court's order was not ambiguous as to its intent or scope, and was entirely consistent with the Ninth Circuit's standards concerning Rule 58 orders on post-judgment motions. (*Hollywood v. City of Santa Maria*, 886 F.2d 1228 (9th Cir. 1989)) In *Hollywood*, the court concluded that a 9-page order denying a Rule 59 motion satisfied Rule 58 even though it included explanatory material. Respondent believes that an identical situation exists here: the August 22 order was clearly a final order on its face even though it too included the court's reasoning and other explanatory material.

Likewise, the Ninth Circuit's view of Rule 58 is not inconsistent with this Court's decision in *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978) where this Court concluded that under certain circumstances, Rule 58 is not required to be applied with mechanical precision and this is especially so in cases of post-judgment motions.

II

THE DISTRICT COURT'S AUGUST 22, 1996 ORDER CANNOT BE DISTURBED SINCE IT WAS NOT TIMELY APPEALED

The Ninth Circuit did not address the applicability of Rule 58 because Petitioner never raised that issue in the appellate process until now. Instead, the Court of Appeal disposed of the appeal on other jurisdictional grounds. Now, since Petitioner's appeal was twice rejected on procedural and jurisdictional grounds, Petitioner now seeks a hearing on the merits by arguing that the 30-day period for filing a notice of appeal under Rule 4(a)(1) of the Federal Rules of Appellate Procedure has not expired with respect to the District Court's August 22 order, since no Rule 58 judgment has been entered. By making this argument, Petitioner has sought to get around the tolling issues discussed by the Ninth Circuit in its memorandum decision filed on November 6, 1997. Briefly, the Ninth Circuit rejected Petitioner's argument that his filing a motion for reconsideration tolled the time requirements of Rule 4(a)(1) because his motion for reconsideration itself was filed more than 10 days after the entry of the judgment for which reconsideration is sought. Thus, his motion for reconsideration did not toll the 30 day appeal period and the Ninth Circuit found it lacked jurisdiction to consider his appeal.

In reality, Petitioner has used both sides of the Rule 58 issue. On the one hand, a timely filed motion for reconsideration of the August 22 order would have tolled the period for filing an appeal of that order, but his motion for reconsideration was filed too late to toll the appeal period. Still, that he sought reconsideration of the

August 22 order indicates that he clearly understood that the August 22 order denied his motion and was a final decision by the court with respect to that motion. He cannot now argue that he was unclear as to the purpose and effect of the August 22 order. We disagree that a person is entitled to two attempts at filing an appeal, which would be the case here if Petitioner is allowed to proceed on his Rule 58 theory.

To the contrary, the Court of Appeal bent over backwards to consider all the grounds on which the appeal could be considered – assuming the August 22 order was a valid order for purposes of Rule 58. The court correctly rejected Petitioner's appeal of the August 22 order on the basis that the appeal was untimely and lacked jurisdiction.

III

THE "SPIN-AROUND" RULE DOES NOT SAVE AN OTHERWISE UNTIMELY APPEAL

Petitioner urges this Court to use the "spin-around" rule to save his untimely appeal, a rule developed from this Court's decision in *Mallis, supra*. This argument ignores the fact that Petitioner's appeal was untimely. The "spin-around" rule applies only to otherwise properly filed appeals, which is not the case here.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Dated: February 23, 1998

Respectfully submitted,

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City of Carmel-by-the-Sea